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To Leave or Not to Leave—Law Libraries and the FDLP: A Decade Later, Is That Still the Question?

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To Leave or Not to Leave—Law Libraries and the FDLP: A Decade Later, Is That Still the Question?*

Lauren Michelle Collins**

Law libraries have long been accepted as integral to the FDLP mission of free access to government information. Though the FDLP model lags behind the times and conditions force many to consider withdrawal, coming change in the FDLP's structure should encourage law librarians to maintain membership and embrace future roles.

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Introduction

¶1 In the summer of 2016, at the Cleveland-Marshall College of Law Library, we were forced to choose between two job positions—one that, among other duties, included the coordination of our participation in the Federal Depository Library Program (the FDLP or the Program), and one that would manage our growing institutional repository. We chose the latter, leaving the question of who would manage our participation in the FDLP uncertain. Just weeks before, the main campus library lost its documents coordinator to retirement and was not permitted to fill the position. At the same time, management at both libraries was considering limiting the hours we were open to the general public due to recent petty thefts and at least one uninvited overnight guest. Though these issues had been quickly resolved, we theorized that these crimes of opportunity could be minimized in the evenings when staffing was light by closing to the general public at 8 P.M. Since building access is an important consideration under FDLP guidelines, this raised a second potential challenge to our FDLP membership. The question of withdrawal was raised more than once as we determined how we would handle these changes. These circumstances are probably familiar to many other law librarians.

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¶2 Most of the librarians involved in the process of determining how our documents are managed had no strong feelings for or against remaining in the FDLP since many of the library's government information patrons were directed to free online government resources available from the Government Publishing Office (GPO),¹ independent of FDLP membership, or purchased from commercial vendors. Only our cataloger was adamantly against withdrawing. From her perspective, the time that staff would need to dedicate to withdrawal would be much more demanding in the short term than the time commitment (just a few hours per month) required to manage the limited print documents we still received through the FDLP and infrequent program reviews. Accounts of the nightmare of withdrawal—including listing each item for other libraries to claim, removing records from the catalog (almost 33,000 for us, including 14,000 items that would have to be recalled from off-site storage), and the potential loss of historical items to regional depositories—are a part of librarianship lore and literature that she did not wish to experience firsthand. Instead of chancing a difficult withdrawal, she argued that the library should remain in the Program by relying primarily on electronic government information, perhaps even decreasing selections below the already low 2.48% currently collected, and committing to her department's continued management of the few items still received in print. For her, leaving the FDLP was not a viable solution for our library. In different circumstances, others have come to the opposite conclusion, but not without much consideration of the role law libraries have played in the FDLP goal of an informed public.

¶3 The question of whether to stay in the FDLP is neither new nor unique. Just this year, the GPO published a report on libraries leaving the FDLP between 2007 and 2015.² Though focused on public libraries, the report shows that a total of 112 libraries left the FDLP during this period.³ Though overwhelmingly general academic and public libraries, five were law libraries.⁴ With the backdrop of the challenges being faced in legal education within this time period, it is surprising that law libraries made up such a small percentage of the members leaving the FDLP. Though the status of law libraries in the Program has been examined before, considering these new challenges, the availability of government information independent of FDLP status, and the data showing other libraries leaving the Program, a reexamination of law library participation in the FDLP seems due.

¶4 This article will recount the literature of the late 1990s and early 2000s, when some librarians, considering the changing form of government information, questioned whether the FDLP would survive in its existing form and recommended

1. Since 2014, under the Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 1301, 128 Stat. 2130, 2537–39 (2014), the former Government Printing Office has been redesignated the Government Publishing Office. Both names are used in this article, depending on the time of the reference.

2. U.S. GOV'T PRINTING OFFICE, TO BETTER SERVE AND SUPPORT PUBLIC LIBRARIES: GPO'S ANALYSIS AND FINDINGS ON PUBLIC LIBRARIES LEAVING THE FEDERAL DEPOSITORY LIBRARY PROGRAM BETWEEN 2007–2015 (2017), <https://www.fdpl.gov/file-repository/about-the-fdpl/special-reports-from-gpo/2836-to-better-serve-and-support-public-libraries-gpo-s-analysis-and-findings-on-public-libraries-leaving-the-federal-depository-library-program-between-2007-2015-final-report/file> [<https://perma.cc/D77H-5AKK>].

3. *Id.* at 14.

4. *Id.* at 24.

FDLP changes that would keep depository libraries engaged as the means of accessing digital government information evolved. In the later 2000s, articles and reports included comprehensive suggestions to the GPO, by and on behalf of library associations, of ways to make depository libraries stronger partners in the FDLP. Possibly in response to these calls for reform, the GPO polled depository libraries in its 2012 *FDLP Forecast Survey* to gauge interest and commitment to new and evolving roles for depository libraries responsive to the digital environment in which we now find most government information. This article will summarize the results of that survey. The article will then present the results of an independent survey of academic law libraries conducted by the author to find out whether law library leaders are considering withdrawal from the FDLP or still find FDLP partnership an essential component of access to government information through their libraries. Finally, the article will briefly outline GPO plans for the FDLP released in 2016. Ultimately, the article concludes that whether to withdraw from the FDLP may no longer be a timely question for most law libraries as the GPO works on plans to forge a more modern relationship with libraries, one that better aligns with contemporary law library missions, capabilities, and priorities.

Early Examinations of the Question of Withdrawal

¶5 Whether there is a continued need for law library membership in the FDLP is a question that has been raised several times over the last decade. In one 2007 article, the author posited that “academic law librarians play an essential role in promoting democracy through participation in the Federal Depository Library Program.”⁵ This continued a long tradition of scholarship examining the questions of how and whether academic libraries should continue to participate in the FDLP. Almost a decade before, Laura Orr-Waters had outlined the benefits of FDLP membership, as well as arguments against continued participation.⁶ In the years between the publication of these articles, more libraries withdrew from the FDLP than had in the then-recent past; “between August 1998 and August 2001, the number of libraries leaving the Federal Depository Library Program (FDLP) increased by more than a third over the previous three years.”⁷ At least one academic law library withdrew from the FDLP during this period.⁸ The FDLP had been “originally based on a geographic model of information access,”⁹ the goal of which was to “ensure no matter how far a citizen lived from the seat of power, he or she could gain knowledge of the inner workings of the government through the wide dispersal of the information it produced.”¹⁰ However, the means of delivering government information was changing, and this was

5. Tammy R. Pettinato, *Legal Information, the Informed Citizen, and the FDLP: The Role of Academic Law Librarians in Promoting Democracy*, 99 *LAW LIBR. J.* 695, 695, 2007 *LAW LIBR. J.* 44 ¶ 1.

6. Laura Orr-Waters, *Love It or Leave It: Government Depositories in Law Libraries*, 15 *LEGAL REFERENCE SERVS. Q.*, nos. 3/4, 1996, at 133.

7. Yvonne T. Lev et al., *Making the Decision to Relinquish U.S. Document Depository Status*, 2 *PORTAL: LIBR. & ACAD.* 413, 413 (2002).

8. Elizabeth M. McKenzie et al., *Leaving Paradise: Dropping Out of the Federal Depository Library Program*, 92 *LAW LIBR. J.* 305, 305, 2000 *LAW LIBR. J.* 27, ¶ 2.

9. Pettinato, *supra* note 5, at 695, ¶ 2.

10. *Id.*

beginning to impact the perception of the effectiveness of the FDLP based on geographic access.

¶6 As early as the late 1990s, the geographic model was first questioned by academics who asked whether the movement of government documents to electronic formats, and the promise of even greater migration, potentially brought the citizenry to the seat of power virtually, no matter their home locations. This direct connection between the citizen and government information led many to question the continuing role of libraries in attaining the ultimate goal of supporting an informed citizenry.¹¹ When increased accessibility of government information in electronic formats and the decline of the academic library budget collided, library directors began to wonder whether the resources directed to supporting FDLP membership should be shifted to meet other institutional priorities.¹² These questions were soon echoed in the context of law libraries.¹³ Considering the current downturn in overall law school attendance¹⁴ and its impact on law school finance,¹⁵ and the resulting reconsideration of some library services, particularly to secondary patrons, it is likely that changes in institutional priorities are currently on the table for many law libraries.

¶7 Law school libraries were afforded FDLP status as early as 1929, when Louisiana State University Law Library became a depository library,¹⁶ and libraries associated with accredited law schools have been afforded favor for FDLP status since 1978, by their ability to apply without support from a federal legislator in the state in which they sit.¹⁷ This is significant to the end goal of an informed citizenry. Government document collections in law libraries have an exponential impact on citizen access to justice since our staffs “provide service not only to the public directly, but through attorneys, judges, legal scholars, legislators, and other [g]overnment officials as well.”¹⁸ Even for law libraries where such support remains central to the mission, the impact of declining enrollment that most law schools have experienced since the recession of 2008, and resulting decreases to library staffing levels, raise the question of whether we can continue to bear the costs of the FDLP. With close to ninety percent of FDLP documents reported to be directly

11. See *id.* at 696, ¶ 2.

12. David C.R. Heisser, *Federal Depository Program at the Crossroads: The Library Administrator's Perspective*, 16 GOV'T INFO. Q. 241, 242 (1999); see also David Durant, *The Federal Depository Library Program: Anachronism or Necessity?*, 62 N.C. LIBR. 30, 37–38 (2004); James A. Jacobs et al., *Government Information in the Digital Age: The Once and Future Depository Library Program*, 31 J. ACAD. LIBR. 198, 199–201 (2005).

13. See Pettinato, *supra* note 5, at 696, ¶ 3.

14. See, e.g., Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J.L. REFORM 177 (2012); Deborah M. Hussey Freeland, *The Demand for Legal Education: The Long View*, 65 J. LEGAL EDUC. 164 (2015).

15. Ashby Jones & Jennifer Smith, *Amid Falling Enrollment, Law Schools Are Cutting Faculty*, WALL ST. J. (July 15, 2013, 4:39 PM), <http://www.wsj.com/articles/SB10001424127887323664204578607810292433272>.

16. Paul A. Willis & Richard G. Hutchins, *Law Libraries and the Depository Program*, 65 LAW LIBR. J. 190, 193 (1972).

17. See Act of Apr. 17, 1978, Pub. L. No. 95-261, 92 Stat.199 (codified as amended at 44 U.S.C. § 1916 (2012)); U.S. GOV'T PRINTING OFFICE, DESIGNATION HANDBOOK FOR FEDERAL DEPOSITORY LIBRARIES 7 (2008), http://www.lib.noaa.gov/collections/gov/FDLP_Designation-handbook.pdf [<https://perma.cc/47JN-WLVK>].

18. Willis & Hutchins, *supra* note 16, at 190.

accessible by the public online since 2005,¹⁹ a second question, whether we are still integral to the provision of access to government information to the general public, is also significant. It would seem that shifting priorities and questionable continued import would make leaving the FDLP at least a consideration for many, despite concerns about the withdrawal process.

¶8 Though there are anecdotal accounts of the difficult experience of FDLP withdrawal, there are some published descriptions of the process of withdrawal by law libraries that do not reflect that experience. The most detailed account comes from the Suffolk University Law Library. After sixteen years in the FDLP, several circumstances, including a pending move to a building inaccessible to the public, the loss of the documents librarian, and the retirement of the director at Suffolk, led to the consideration of withdrawal from the FDLP.²⁰ Access to agency information on agency websites, duplicate access to federal statutes, decisions, and regulations, plus the inability to choose among items in the selected subjects needed by the library, meant the receipt of many unwanted documents that required resources to process, and the value of the desired free items was diminishing compared to the extra effort.²¹ In addition, the librarians at Suffolk determined that, as a private school, the need to direct most resources to their affiliates created a conflict between service to primary and lay patrons that “often cause[d] depository patrons to be treated as third-class users.”²² The challenge of delivering services to depository users at the high service level the library staff was able to provide to their primary constituents led to the difficult decision to withdraw from the FDLP.²³

¶9 The process of withdrawal for Suffolk was not as challenging as had been anticipated, and this was attributed, in part, to early investigation and planning.²⁴ The main challenge Suffolk faced was developing a relationship with a commercial vendor selling the needed GPO documents after withdrawal,²⁵ a problem not directly attributable to the GPO at all. Fortunately, a helpful “How-to-Guide” summarizing the details of Suffolk’s process appeared in *AALL Spectrum* in 2000.²⁶

¶10 Another published account of withdrawal from the FDLP focuses on the George Washington University (GW) Law Library.²⁷ A “chronic lack of space” was a key challenge to the GW Law Library.²⁸ Access policies at the law library had long required local attorneys and visiting law students to submit requests to use the library, and GW undergraduates needed to have a class assignment requiring legal materials to enter. This led to the uneven result of those expressing a desire to use depository materials having more access than members of the legal community and

19. John A. Shuler, Editorial, *Informing the Nation: The Future of Librarianship and Government Information Service*, 22 *Gov’t INFO. Q.* 146, 148 (2005).

20. See McKenzie et al., *supra* note 8, at 305, ¶ 2. A practical account of this experience is also published in Elizabeth Gemellaro, *Dropping Federal Depository Status: A How-To Guide*, *AALL SPECTRUM*, June 2000, at 26.

21. McKenzie et al., *supra* note 8, at 307, ¶¶ 7–8.

22. *Id.* at 309, ¶ 14.

23. *Id.* at 310, ¶ 16.

24. *Id.* at 311–13, ¶¶ 21–29.

25. *Id.* at 314–15, ¶¶ 34–38.

26. Gemellaro, *supra* note 20, at 26.

27. Iris M. Lee, *Withdrawing from the FDLP: A Responsible Solution*, *LAW LIBR. LIGHTS*, Fall 2001, at 6.

28. *Id.*

university affiliates.²⁹ With the challenges caused by inaccessibility and a commitment from the law school to add to the library's budget to cover the costs of replacing the GPO-provided resources, GW staff made the decision to withdraw from the Program. Like Suffolk, GW is a private university, and the drain of varying access levels on staff caused tension with service to students paying substantial tuition rates.³⁰ Though library staff was conflicted about limiting service to the public, the strain on resources guided their ultimate decision.³¹

¶11 In view of new challenges, in addition to those faced by GW and Suffolk almost a decade ago, and their accounts of withdrawal that are not as ominous as expected, should more law libraries be considering withdrawal today, or are there other options? One alternative suggested by several academic librarians in the literature of the last two decades is for the GPO to develop a new FDLP model that loosens FDLP guidelines, accounts for growing access to the public away from libraries, and decreases deterrents to library participation.

Librarians Question the Future of the FDLP and Recommend Change

¶12 From the late 1980s, and continuing into the early 2000s, the advent of electronic access to government documents led to questions about the direction the GPO should take toward its goal of maintaining public access to what is now thought of as government information—a less static and format-dependent concept than that of government documents.³² Two successive developments were key to these questions. First, electronic storage by means of devices such as CD-ROMs led the GPO to dictate minimum requirements for public access workstations and guidelines for services in support of access to government information in electronic formats, which some libraries deemed onerous or, given their resources, fiscally imprudent.³³

¶13 Citing the format change and comparing “the process of getting government publications into depository libraries” to an “outdated vacuum cleaner,”³⁴ a group of seven documents librarians from all over the country listed increasing costs, inconsistency in adherence to governing statutes, and the shift to digital government information as overarching issues facing the GPO in the future administration of the FDLP.³⁵ At the time of the article, which they subtitled *The Librarians' Manifesto*, the Office of Management and Budget (OMB) interpreted FDLP distribution requirements to apply to “government publication[s],” defined as “individual publications” produced by the GPO, leaving distribution of electronic government information voluntary.³⁶ With many valuable items excluded from FDLP distribution, the value of the Program came into question. In fact, there

29. *Id.*

30. *Id.*

31. *Id.* at 6–7.

32. Paul T. Jaeger et al., *The Federal Depository Library Program (FDLP), Academic Libraries, and Access to Government Information*, 36 J. ACAD. LIBRARIANSHIP 469, 471–73 (2010).

33. Heisser, *supra* note 12, at 244.

34. Gary Cornwell et al., *Problems and Issues Affecting the U.S. Depository Library Program and the GPO: The Librarians' Manifesto*, 20 GOV'T PUBLICATIONS REV. 121, 122 (1993).

35. *Id.* at 122–23.

36. *Id.* at 124.

was a concern that the problem of fugitive documents—those produced by agencies and deemed outside the FDLP requirements—would be exacerbated by new electronic formats. It was feared these agency documents, which had caused discovery issues in the past, would be separately distributed intentionally in an effort to create new revenue streams for agencies.³⁷

¶14 The changes in government information were “rapid and pervasive [and] the technological nature of the changes . . . made their implications obscure.”³⁸ The challenges initially presented by early innovations that resulted in the need to network CD-ROMs and hefty telecommunications charges for online access³⁹ did not last; the information moved online, and Internet access to government information became free and direct to the end user. This was precipitated by the second development, the enactment of the Government Printing Office Electronic Information Access Enhancement Act of 1993 (the Act), which required online publication of the *Congressional Record* and the *Federal Register*.⁴⁰ Besides making these two important government resources available online, a secondary goal of the Act was to obtain “valuable insights into the most effective means of disseminating all public Government information.”⁴¹ After online publication of these two resources was mandated, additional government information became available online, and gradually more and more government information no longer required expensive networking, telecommunication fees, or even a trip to the library. Though some of this proved a relief, the decreasing connection between the library and government information eventually caused librarians and library associations to stress the need for the GPO to develop a comprehensive plan to address the effect that direct public access to government information on the Internet would have on the FDLP relationship with member libraries.⁴²

¶15 In the years after the Act was passed, there was quickly evidence that government information became not only more *accessible*, but more frequently *accessed*, electronically. For example, while demand for print copies of the 2000 Federal Budget had shrunk (the GPO “sold fewer than 4,500 print copies (a 40% drop from 1998 print sales)”), the budget “was accessed more than 115,000 times online.”⁴³ In just eight years, between 1992 and 2000, the number of print documents available to FDLP libraries shrank from 70,468 to 26,994⁴⁴ and, by 2005, over 90% of the FDLP titles were available electronically.⁴⁵ A 2008 study of FDLP patrons found 77.4% regularly used a commercial search engine to find government information electronically, 9.3% found government information online using GPO

37. *Id.* at 125–26.

38. Jacobs et al., *supra* note 12, at 198.

39. Cornwell et al., *supra* note 34, at 124.

40. Government Printing Office Electronic Information Access Enhancement Act of 1993, Pub. L. No. 103-40, 107 Stat. 112 (codified as amended at 44 U.S.C. §§ 4101–4104 (2012)).

41. William J. Clinton, Statement on Signing the Government Printing Office Electronic Information Access Enhancement Act of 1993, 1 PUB. PAPERS 820 (June 8, 1993).

42. See, e.g., ASS'N OF RESEARCH LIBRARIES, WHITE PAPER: STRATEGIC DIRECTIONS FOR THE FEDERAL DEPOSITORY LIBRARY PROGRAM (Apr. 2009), <http://www.arl.org/storage/documents/publications/fdlp-strategic-directions-april09.pdf> [<https://perma.cc/H8NW-HJTX>]; Jacobs et al., *supra* note 12, at 199.

43. Jaeger et al., *supra* note 32, at 471.

44. *Id.*

45. *Id.*

Access (then the GPO's portal for government information), and only 5.5% continued to use print government documents.⁴⁶

¶16 As users' preferred means of accessing government information transformed and information on the Internet increased, the question of the role of libraries in the FDLP also shifted slightly from whether libraries were financially capable of providing government information through new digital mediums like costly CD-ROMs to whether, with Internet access growing, libraries were a necessary component at all.⁴⁷ Considering the many financial challenges facing libraries during this twenty-year period, academic libraries were left with difficult choices to make about their role in the provision of access to government information. At the beginning of the twenty-first century, a need for FDLP reform became clear.

The combination of infrastructure pressures (funding, space, staff), technological change (the ability to access and disseminate authenticated documents electronically), societal expectations that increasingly favor electronic access to federal information, economic constraints due to recession, and a new technologically-savvy presidential administration make plain the need to modernize the approaches to government information in FDLP member libraries and other academic libraries.⁴⁸

¶17 There were other arguments contemporary with those expressed in *The Librarian's Manifesto*. These included (1) the FDLP was a "costly and inefficient anachronism" since government information, which had grown exponentially, was overwhelming to the Program as originally conceived, and libraries should offset the costs of the Program;⁴⁹ (2) the increase in government information and addition of electronic formats "jeopardized the effectiveness of the print-based FDLP to meet the public's increasing need for government information";⁵⁰ and (3) libraries, which had invested money and time in maintaining FDLP materials, "deserve[d] to be more fully included in congressional and the GPO's mapping of the future of the FDLP and setting its priorities."⁵¹

¶18 While these were all legitimate concerns of the time, and some remain so today, others have proven to be less of an impediment than predicted. First, though there have been periods when access to agency information was threatened by White House policy,⁵² there was a "proliferation of federal agencies publishing directly to the Web [beginning] in the 1990s."⁵³ Though preservation and cataloging of agency information remains a very real concern,⁵⁴ a great deal of current agency information is generally available via the Internet.⁵⁵

46. *Id.*

47. Durant, *supra* note 12, at 30.

48. Jaeger et al., *supra* note 32, at 469.

49. Bruce Morton, *The Depository Library System: A Costly Anachronism*, LIBR. J., Sept. 15, 1987, at 52, 54.

50. Gary Cornwell, *The Federal Depository Library Program: A Call for Action*, 20 J. ACAD. LIBRARIANSHIP 97, 97 (1994).

51. *Id.* at 97.

52. Sarah Potvin & Laura Sare, *Public Goods and Public Interests: Scholarly Communication and Government Documents in Research Libraries*, 16 PORTAL: LIBR. & ACAD. 417, 423–25 (2016).

53. *Id.* at 425.

54. Even when the White House Office of Science and Technology Policy has dictated draft policies for "long term access" to agency information, one in seventeen resulting draft policies failed to mandate retention or preservation. *Id.* at 434.

55. Under a new federal administration, whether this changes remains to be seen. There are

¶19 The costs of access to digital government information is also less harrowing than at the start of the conversion of government information to electronic formats. With data costs shrinking for the end user and widespread WiFi in libraries, coffee houses, and city squares, access to information placed on the Internet is prevalent, and the costs of accessing information online have decreased substantially since the turn of the century. Though fees for public access to government information were briefly charged to the end user in the mid-1990s when GPO Access required subscription, “this initiative was abandoned after [the GPO] concluded the effort was not only counter-productive and a poor business model but, more importantly, that it impaired public access to Government information resources.”⁵⁶ Part of the failure of this plan was the fact that depository libraries retained free access to the service.⁵⁷

¶20 Recommitting to the position that fees for access to government information were not optimal, then-acting and now U.S. Public Printer Davita Vance-Cook stated in 2013 that the GPO does not intend to implement fees for the Federal Digital System (FDsys),⁵⁸ which replaced GPO Access in 2009. This came in response to a call by the National Academy of Public Administration to explore alternative funding models for FDsys, including reinstating fees for end users.⁵⁹ While this pledge is reassuring in the short term, it should be noted that, in 2010, FDsys was severely over budget.⁶⁰ In 2011, while acknowledging the importance of FDsys, the House of Representatives passed legislation defunding it as a part of the FY 2012 appropriations bill, charging the GPO with finding alternate funding for the system.⁶¹ While the ultimate appropriations for that year did fund the GPO revolving fund, which supports FDsys, it was funded in an amount much lower than requested and previously granted.⁶² Fortunately, this allocation was an anomaly; FDsys-dedicated funds

some indicators that policy change is imminent. See, e.g., David Kroll, *EPA Reportedly Ordered to Remove Climate Change Webpage, Rescinded 24 Hours Later*, FORBES (Jan. 25, 2017, 8:30 AM), <https://www.forbes.com/sites/davidkroll/2017/01/25/epa-ordered-to-remove-climate-change-webpage/#349910552263>; Valerie Volcovici, *Trump Administration Tells EPA to Cut Climate Page from Website: Sources*, REUTERS (Jan. 25, 2017, 12:31 PM), <http://www.reuters.com/article/us-usa-trump-epa-climatechange-idUSKBN15906G> [<https://perma.cc/8ZWB-XDEY>].

56. Letter from Davita Vance Cook, Acting Public Printer, Gov’t Publ’g Office, to Bernadine Abbot Hoduski, Librarian/Staff Member, Joint Comm. on Printing (Mar. 3, 2013) (on file with author) [hereinafter Letter from Davita Vance Cook].

57. Jacobs et al., *supra* note 12, at 199.

58. Letter from Davita Vance Cook, *supra* note 56.

59. NAT’L ACAD. OF PUB. ADMIN., REBOOTING THE GOVERNMENT PRINTING OFFICE: KEEPING AMERICA INFORMED IN THE DIGITAL AGE 44 (2013), <http://www.napawash.org/wp-content/uploads/2013/02/GPO-Final.pdf> [<https://perma.cc/6TEY-52A9>].

60. U.S. GOV’T PRINTING OFFICE, FEDERAL DIGITAL SYSTEM (FDsys) INDEPENDENT VERIFICATION AND VALIDATION—TENTH QUARTER REPORT ON RISK MANAGEMENT, ISSUES, AND TRACEABILITY 10 (Assessment Rep. No. 10-05, 2010), https://www.gpo.gov/pdfs/ig/audits/10-05_FinalRptFDsysIVQtr10.pdf [<https://perma.cc/FZK4-4JM2>].

61. Legislative Branch Appropriations Act, H.R. 2551, 112th Cong. (2012); H.R. REP. NO. 112-148, at 27 (2011).

62. See Consolidated Appropriations Act, Pub. L. No. 112-74, 125 Stat. 786 (2011) (funding the revolving fund in the amount of \$500,000 for technology development where the GPO request had been \$5 million); U.S. GOV’T PRINTING OFFICE, BUDGET JUSTIFICATION: FISCAL YEAR 2012, at G2 (2011), https://www.gpo.gov/pdfs/congressional/budget_justification_2012.pdf [<https://perma.cc/R8WP-YQXS>].

have fluctuated between \$12 million in 2010, at the peak of development, to close to \$7 million in 2016.⁶³

¶21 As time passed and a number of the feared consequences of an unchanged FDLP seemed less imminent, some authors continued to question the viability of the Program, at least as it was originally conceived in the 1800s and, with the most significant change being made by the Depository Library Act of 1962,⁶⁴ essentially remains today. Recognizing the need for coordinated dissemination of digital government information to end users through libraries, many scholars began encouraging the GPO to change its relationship with the FDLP depository libraries rather than eradicating the Program altogether. Though the electronic dissemination of government information has become a proven way to simplify free access to current government information to the public, some researchers have argued that a significant gap between the traditional FDLP and online access has led to “the loss of a secure infrastructure for long-term preservation and access to government information.”⁶⁵

¶22 In 2004, the GPO issued a strategic plan that included the introduction of proposals for a new FDLP model,⁶⁶ which some librarians believed woefully dismissed the continued role of libraries, and argued that, though the plan included libraries as partners, their position was not clearly articulated⁶⁷ and clarification of the role for libraries was necessary:

With these goals, the GPO treats libraries as it does other users—no documents are deposited, and libraries are free to “access” materials held by the GPO and other government agencies. This leaves the GPO free to impose access restrictions, or charge for information access, or both. The plan significantly omits any mention of FDLP libraries having collections that they manage and even omits specifying that the public will be permitted to download or print documents.

These omissions are either severe oversights or intentional changes in policy. If they are changes in policy, then this, coupled with the drastic reductions in printed publications, means that the GPO will no longer be depositing documents in depository libraries. This, combined with the GPO’s cost recovery model of distribution of digital information, will mean a reduction in free public access. The government, not libraries, will have collections and will decide what will be in them and who will have what level of access at what cost.⁶⁸

¶23 This was an omission that the GPO could have easily avoided since a change in the format of government information was not necessarily a reason to change the composition of the FDLP, and distribution of government information

63. U.S. GOV’T PRINTING OFFICE, BUDGET JUSTIFICATION: FISCAL YEAR 2017, at [5] (2016), https://www.gpo.gov/pdfs/congressional/Budget_Justification_2017.pdf [<https://perma.cc/A8B3-W2TE>]. Still, in an unknown political environment such as this, the 2012 account remains distressing.

64. The Federal Depository Library Act of 1962 increased to two the number of depository libraries permitted per congressional district, added libraries from independent federal agencies, authorized establishment of regional depositories, and provided for distribution of non-GPO publications. Pub. L. No. 87-579, 76 Stat. 352 (1962).

65. See, e.g., Jacobs et al., *supra* note 12, at 198.

66. U.S. GOV’T PRINTING OFFICE, A STRATEGIC VISION FOR THE 21ST CENTURY 2 (2004), <http://www.gpo.gov/congressional/pdfs/04strategicplan.pdf> [<https://perma.cc/522T-MWJX>].

67. Jacobs et al., *supra* note 12, at 200.

68. *Id.* (citing a 2005 GPO announcement that it planned to continue to print only those titles on “Essential Titles for Public Use in Paper Format,” a list containing only fifty titles; this was eventually reversed after an action alert released by the American Association of Law Libraries).

in electronic form could have simply been made a part of the Program.⁶⁹ Depository library collections had, more than once, prevented the loss of government information removed from the Internet, because it was duplicated in print in depository collections.⁷⁰ Distributed collections of digital government information would address the traditional FDLP goals of free, private, and easy access to authentic information, as well as preserving materials for future use.⁷¹ Libraries in the digital era could act as curators of digital government information, “selecting, acquiring, organizing and preserving the information as well as providing access to and service for that information.”⁷²

¶24 In addition, “[e]volving arguments for a depository role (similar to ones argued for institutional repositories in the private information market) is for the sake of open access and transparency.”⁷³ Supporting the transparency of government information can extend the civic role that libraries play in the dissemination of government information beyond the traditional provision of collections and support to users accessing government information. It has long been recognized that professional research support provided by law librarians and library staff is one of the benefits of the participation of academic law libraries in the FDLP to end users.⁷⁴ The “internet-enabled access [to government information without libraries] means little to users without the expertise of government information librarians to explain to users how to arrange these blocks [of information] in such a way that makes the policy, services, or resources understandable.”⁷⁵ Building on what many FDLP libraries are already doing individually, a move could be made from emphasis on collections to expanded services, which might result in coordination of “organizational arrangements [that] profoundly influence how libraries collect and manage their local resources, access, and public outreach.”⁷⁶ These arrangements could result in the development of “economies of scale, depth, and service expertise,”⁷⁷ between the GPO and member libraries, and among member libraries, resulting in greater support to end users of government information.

¶25 The Association of Research Libraries (ARL), in a 2009 white paper, further suggested a comprehensive change to the FDLP.⁷⁸ With FDsys, by then a functional means of collecting, providing access to, and preserving new government information (now almost all born-digital with much existing in only digital format⁷⁹) and planning to digitize legacy collections of print government documents, ARL proposed new roles for depository libraries. First, citing the need for “enhanced discovery” of pre-1976 government documents, cataloging that was already underway with

69. *Id.*

70. *Id.* at 201.

71. *Id.* at 200–01.

72. *Id.* at 202.

73. Jaeger et al., *supra* note 32, at 473.

74. Pettinato, *supra* note 5, at 708–13, ¶¶ 37–48.

75. Jaeger et al., *supra* note 32, at 475.

76. *Id.*

77. *Id.*

78. ASS’N OF RESEARCH LIBRARIES, *supra* note 42, at 6.

79. ROGER C. SCHONFELD & ROSS HOUSEWRIGHT, DOCUMENTS FOR A DIGITAL DEMOCRACY: A MODEL FOR THE FEDERAL DEPOSITORY LIBRARY PROGRAM IN THE 21ST CENTURY 3–4 (2009), http://www.sr.ithaka.org/wp-content/uploads/2015/08/Documents_Digital_Democracy.pdf [https://perma.cc/3CLQ-57FJ].

the help of several depository libraries had to increase, and ARL recommended that the GPO develop “a plan for access that provide[d] a clearer understanding of the universe of records that still need[ed] processing” and “cooperative action for cataloging and/or machine-based mechanisms for providing access.”⁸⁰ The report also advocated for the GPO to play “a greater role in network-based, collaborative training programs,” and to meet the “pressing need to expand the number of individuals with expertise in government information.”⁸¹ Finally, recognizing that there were regional depository libraries relinquishing their status, ARL recommended “transition[ing] to a smaller number of comprehensive, print, truly regional, legacy collections.”⁸² Citing cases where these recommended courses of action were clearly being taken on smaller scales, ARL concluded that GPO-coordinated efforts in these directions would provide the structure needed for the FDLP program to survive in a different form going forward.

¶26 Later that year, Ithaka S+R released a report funded by ARL and the Chief Officers of State Library Agencies and referred to as the *Schonfeld Report*, which outlined a model for the FDLP for the new millennium.⁸³ Though mostly focusing on the need for the GPO to develop a new structure for the FDLP, some development of the ideas of library participation in the FDLP from the ARL white paper are reflected in the *Schonfeld Report*. The areas of focus in the report in which libraries have a role include digitization and documents management.⁸⁴ Noting that the “incentives that motivated libraries to participate in the [FDLP], reasonably well aligned in a print environment, are decreasingly appropriate to the digital, networked environment,”⁸⁵ and that libraries were already making efforts to meet some of the needs addressed by ARL like preservation, the *Schonfeld Report* stresses the importance of the GPO’s coordination role in activities meant to fill the gaps in the FDLP related to digital information. For example, the report notes several digitization projects meant to capture historical documents. However, these projects are being done by individual libraries or small consortia with a lack of GPO leadership that risks the duplication of digitization efforts.⁸⁶

¶27 On the topic of print collection management, the report predicts that user preference for electronic access will result in the need for fewer print collections developed in a coordinated manner for the sake of preservation and access for users who prefer the continued use of print.⁸⁷ However, the report makes a prediction specific to law libraries that implies most will not participate in collection coordination but will instead make a choice between maintaining a local core print collection, regardless of the proximity to another, to protect superseded legal resources, or withdrawing from the FDLP.

Some law libraries will be fairly cautious in dealing with the focused set of materials of principal interest to them, viewing core legal materials (including, for example, superseded materials that other libraries—even regionals—may discard as a matter of course) as the

80. ASS’N OF RESEARCH LIBRARIES, *supra* note 42, at 6.

81. *Id.* at 7.

82. *Id.* at 10.

83. SCHONFELD & HOUSEWRIGHT, *supra* note 79, at 5–9.

84. *Id.* at 4.

85. *Id.* at 10.

86. *Id.* at 35.

87. *Id.* at 4.

vital records of their profession rather than as published materials to be treated like general collections. For some law libraries, high thresholds for authenticity will militate against withdrawal even when high-quality digital copies are freely available, while for others these concerns will be overtaken by the opportunity to reassign space to higher-value purposes.⁸⁸

If this is true and law librarians see FDLP membership as only a means of retaining superseded core legal materials, increasingly available in fee-based databases that libraries are already likely to purchase, and do not see a need for the digitized versions of these materials provided through the FDLP or a cooperative role for our libraries in digitizing them, one might predict that we are all thinking about cutting our losses and leaving the Program. However, the prediction ignores the significant role law libraries have had in the access of government information throughout our years of participation in the FDLP and assumes law librarians see no future role beyond the maintenance of existing collections.

GPO Polls FDLP Members: The Forecast Survey of 2012

¶28 In 2012, the GPO demonstrated an intent to consider recommendations for changing the Program when it surveyed its members in the *FDLP Forecast Survey*. The survey questions focused on six main topic areas:

1. Affiliations and Community Marketing
2. Collection Management
3. Education
4. Library Services and Content Management (LSCM) Projects
5. Preservation
6. Future Roles and Opportunities

Several of the areas that the GPO selected to study clearly mirror those suggested by librarians, demonstrating an acknowledgment by the GPO of the value of the opinions of librarian scholars.

¶29 Questions in the topic area of “Affiliations and Community Marketing,” which the GPO considers “integral to the continued success of the FDLP and to increasing awareness of FDLP libraries”⁸⁹ and to the growth of the Program,⁹⁰ were asked in an effort to determine whether FDLP libraries were working with other FDLP libraries or groups outside of the Program to deliver access and service. More than half of libraries (fifty-five percent) had no such relationships, and a strong majority (eighty-eight percent) had no intention of forging new relationships.⁹¹ Though facilitation of collaboration was one of the remedies often suggested to the GPO, an interest level supportive of widespread change to the FDLP in this way was not expressed by member libraries.

¶30 There is a clear recommendation in the literature that service and preservation should overcome traditional collection management as the main focus of the

88. *Id.* at 38.

89. U.S. GOV'T PRINTING OFFICE, FEDERAL DEPOSITORY LIBRARY PROGRAM FORECAST STUDY FINAL REPORT 11 (2014), <https://www.fdlp.gov/file-repository/about-the-fdlp/gpo-projects/fdlp-state-forecast/2593-fdlp-forecast-study-final-report> [<https://perma.cc/B2GH-8E7T>].

90. *Id.*

91. *Id.*

FDLP; however, the responses to collection management–related questions in the *FDLP Forecast Survey*, “reinforce[d] that collection management is a central focus for libraries and is essential to the FDLP.”⁹² Of the ninety-two percent of respondents who considered the FDLP “an important source of both tangible and digital authenticated government information,”⁹³ 439 elaborated, indicating the types of content they deemed essential, and noted that “all formats of materials are important, and also that specific types of users prefer and use certain formats.”⁹⁴ Paradoxically, 273 respondents answered an open-ended question asking for an explanation of reasons the tangible FDLP collection might not be viewed positively, and twenty-eight percent had a negative impression due to the resources required by the library to maintain the tangible collection, including staff, time, and labor. Twenty percent listed reasons related to the management of tangible items as basis for a negative perception; thirteen percent cited low, declining, or barriers to patron use as the reasons for a negative perception;⁹⁵ and fifty-two percent “anticipate[d] barriers [would] exist to access digital only government information in the next five years.”⁹⁶ Further, ninety-one percent of respondents did not have formal selective housing arrangements for collections, and fifty-one percent were not interested in establishing such agreements.⁹⁷ The majority were unwilling to commit to the development of specific subject-focused collections.⁹⁸

¶31 Perhaps the inconsistency between librarians’ belief in the importance of receiving government information in multiple formats and their lack of motivation to take part in maintaining coordinated collections is impacted, at least in part, by the assessment of seventy-nine percent of respondents who “indicate that their patrons use commercial or non-depository resources to find Federal Government information in their libraries,”⁹⁹ resulting in a perception of little need for a coordinated FDLP plan. Although proposals by scholars who urged the GPO to lead depository libraries in determining the appropriate balance of print and digital content in their libraries and in their geographic regions and to develop corresponding collections may be sound in theory, the survey does not show willingness on the part of libraries to participate.

¶32 Survey responses in the next two topic areas, “Education” and “LSCM Projects,” were generally favorable, with most librarians agreeing they would participate in further educational efforts, and rating projects of the Library Services and Content Management business unit highly. The following topic area,¹⁰⁰ “Preservation,”

92. *Id.* at 13.

93. *Id.*

94. *Id.* at 14.

95. U.S. GOV’T PRINTING OFFICE, *FDLP FORECAST STUDY DATA REPORT LIBRARY FORECAST, Question 11*, at 2–3 (2013), <https://www.fdlp.gov/project-list/fdlp-forecast-study> (full report, *supra* note 89; retrieve full report, click on “Library Data Reports” and go to individual question results) [hereinafter *Question [XX]*, in U.S. GOV’T PRINTING OFFICE].

96. U.S. GOV’T PRINTING OFFICE, *supra* note 89, at 14.

97. *Id.* at 14–15.

98. *Id.* at 14.

99. *Question 9*, in U.S. GOV’T PRINTING OFFICE, *supra* note 95, at 2.

100. U.S. GOV’T PRINTING OFFICE, *FDLP FORECAST STUDY DATA REPORT LIBRARY FORECAST, Working Papers, Preservation*, at 15–17 (2013), <https://www.fdlp.gov/project-list/fdlp-forecast-study> (full report, *supra* note 89; retrieve full report, click on “Working Papers” and go to individual topic). The topic area “Future Roles and Opportunities” was a series of open-ended questions giving

demonstrated further inconsistency. Though over eighty percent of library directors and their designees surveyed in a separate 2013 study considered digitized special collections “critical to [their] current strategic direction,”¹⁰¹ and sixty-four percent predicted that “digitizing special collections materials [would be a] top strategic priorit[y] over the next three years,”¹⁰² eighty-seven percent of libraries responding to the *FDLP Forecast Survey* were not digitizing, and eighty-two percent had no plan to digitize government documents.¹⁰³ While many librarian scholars had recommendations for the GPO to save the FDLP by changing its structure, responses to the *Forecast Survey* from depository libraries simply did not demonstrate strong motivation to effect widespread change.

¶33 The second greatest response rate to the *FDLP Forecast Survey* was from academic law libraries; responses were submitted on behalf of seventy-one percent or 109 of the 154 academic law libraries that were FDLP members at the time. Of law library respondents, ninety-five percent agreed that the FDLP is a significant source of tangible and digital government information,¹⁰⁴ with eighty-three percent stating that there were “distinct user groups” that preferred to use digital formats¹⁰⁵ and sixty-seven percent stating there were “distinct user groups” that preferred to use tangible formats.¹⁰⁶ Only forty percent of law library respondents anticipated that there would be barriers to accessing digital government information in the next five years,¹⁰⁷ as opposed to fifty-two percent of all respondents. Perhaps this was because ninety-nine percent reported that law library patrons use commercial and nondepository resources to locate government information,¹⁰⁸ twenty percent more than the general response rate.

¶34 Responses to an open-ended question requesting reasons for any negative views of the tangible FDLP collection were reduced to six categories: (1) issues regarding the management of the tangible collection; (2) resource and cost issues (i.e., storage and staffing); (3) a perception of negative value for tangible items; (4) procedural issues in the logistics of maintaining tangible items; (5) a perception of low or decreasing usage of the collection and reasons there might be limited use; and (6) other.¹⁰⁹ The survey could be completed without a response to this question, and responses were provided on behalf of only twenty-nine academic law libraries. Of those, twenty-eight percent cited collection management challenges, and thirty-eight percent cited resource and cost issues. Both negative value perception and perceived procedural challenges were cited on behalf of fourteen percent

responding libraries an opportunity to express any areas in which they thought the GPO could improve. *Working Papers, Future Roles and Activities*, at 1.

101. NANCY L. MARON & SARAH PICKLE, APPRAISING OUR DIGITAL INVESTMENT: SUSTAINABILITY OF DIGITIZED SPECIAL COLLECTIONS IN ARL LIBRARIES 11 (2013), <http://www.arl.org/storage/documents/publications/digitizing-special-collections-report-21feb13.pdf> [<https://perma.cc/M868-ECM4>].

102. *Id.*

103. U.S. GOV'T PRINTING OFFICE, *supra* note 89, at 18.

104. *Question 8*, in U.S. GOV'T PRINTING OFFICE, *supra* note 95, at 3.

105. *Question 5*, in U.S. GOV'T PRINTING OFFICE, *supra* note 95, at 3.

106. *Question 6*, in U.S. GOV'T PRINTING OFFICE, *supra* note 95, at 3.

107. *Question 16*, in U.S. GOV'T PRINTING OFFICE, *supra* note 95, at 3.

108. *Question 9*, in U.S. GOV'T PRINTING OFFICE, *supra* note 95, at 3.

109. *Question 11*, in U.S. GOV'T PRINTING OFFICE, *supra* note 95, at 3.

of law library respondents, and seven percent cited a perception of less than optimal use of tangible government documents.¹¹⁰

¶35 In the area of preservation, where many of the writings indicated FDLP member libraries could be significant contributors to ensuring continued access to government information, only eight percent of law libraries expressed that they were digitizing or planned to digitize FDLP tangible publications.¹¹¹ This number is extremely inconsistent with the general interest in digitization in law libraries. In 2015, after a successful conference at William and Mary Law School, the Executive Board of the American Association of Law Libraries approved a request to begin a Law Repository Caucus. One of the inaugural projects of the Caucus was to develop a directory of institutional repositories in law schools with links to the collections and lists of their contents. That directory shows only forty-nine law schools where no digital collections with law-specific content were found in a review of both fully and provisionally accredited schools at the time of the chart's development.¹¹² Though digitization is clearly a priority of law libraries, responses to the *Forecast Survey* indicate digitization of FDLP collections is not.

¶36 The *Forecast Survey* directly invited libraries to indicate whether they were willing to make formal commitments to increase their roles in the FDLP, over the next five years. Of law libraries, eighty percent responded that they would not be willing to preserve or host a permanent digital collection of government information,¹¹³ sixty-four percent would not be willing to develop a collection of government information covering a specific subject area and share that collection beyond their local community,¹¹⁴ and one hundred percent saw no potential leadership role for their libraries within the FDLP.¹¹⁵ In fact, the optimism of some scholars for partnerships with FDLP member libraries was not reflected in the responses to the *Forecast Survey* provided by many libraries, including academic law libraries.

A Survey on Law Libraries' Future Involvement in the FDLP

¶37 I developed "A Survey on Law Libraries' Future Involvement in the FDLP" and made the survey available in July of 2016. The survey, which remained open for twenty-seven days, provided three tracks that differentiate libraries: those that were never FDLP members, those that had withdrawn from the Program, and those that were actively participating FDLP members. The complete survey was thirty questions, but because there were branching questions, no library in any category was required to answer all questions. The survey was shared through the Law Library Directors' listserv, as the goal was to learn about strategic directions for continued FDLP membership that would be determined on a managerial level.

110. *Id.* at 4.

111. *Question 14*, in U.S. GOV'T PRINTING OFFICE, *supra* note 95, at 3.

112. AALL Law Repository Caucus, Law School Repositories Directory, <https://docs.google.com/document/d/17TYzSttbmsI-37nJ-TIfU1C7tJHMmKQXwvdq2g-Ck/edit> (last visited June 20, 2017).

113. *Question 28*, in U.S. GOV'T PRINTING OFFICE, *supra* note 95, at 3.

114. *Question 29*, in U.S. GOV'T PRINTING OFFICE, *supra* note 95, at 3.

115. *Question 30*, in U.S. GOV'T PRINTING OFFICE, *supra* note 95, at 20.

Future research could be completed by extending the survey to government documents librarians who might have a more vested interest in the continued participation of their libraries in the FDLP.

¶38 Of the 205 academic law libraries affiliated with accredited law schools at the time of the survey, 150 of which were then current FDLP members, staff from 30 libraries submitted complete responses to the survey. The completed responses represented 14.63% of academic law libraries. Of the 30 responses, 6 represented libraries that are not currently FDLP members and, of these, 3 had never been FDLP members and 3 had previously withdrawn from the FDLP. Of those that were never members, 2 were newer law schools accredited after many government resources were moved online and became accessible without FDLP membership.

¶39 The twenty-four remaining respondents represented 16% of all academic law libraries that are active FDLP members; eleven (45.83%) had considered withdrawing from the FDLP, while thirteen (54.17%) had not. Of those that had never considered leaving, ten schools (76.92%) were public. While this could be expected for reasons such as central public missions and decreasing budgets that might make public schools more dependent on free documents to complete their collections, other considerations such as a desire to limit access to all or some of a library's spaces, as with GW and Suffolk, had led to the supposition that the question of withdrawal would have been considered equally by private schools.

¶40 As a follow-up question to whether librarians had considered withdrawal for their institutions, those who had not were given several possible reasons to choose from to explain that decision. Respondents were permitted to choose as many options as were applicable. The two most frequently cited responses were the value of the FDLP to their institutions (76.92%) and the ease of handling FDLP materials since the GPO now allows collection at low rates for selective depository libraries (84.61%). Collection rates for those libraries where withdrawal had not been considered ranged from 2% to 24%, with an average of 11.30%. Each of these libraries had either maintained or decreased their collection rate in the five years preceding the survey; the greatest drop among these rates during that time was 11%.

¶41 The remaining reasons for not considering withdrawal hovered between 20% and just over 30% of responses. The anticipation of the amount of work it would take to withdraw was a reason given by 30.77% of respondents. Each of the remaining options was cited by 23.08% of respondents: the need for the free resources provided by the FDLP, a decision to get most of their government information online, and the desire to protect historical holdings.

¶42 Eleven libraries had considered withdrawing from the FDLP. Seven were private and four were public. Overwhelmingly, the most popular response to the question of why withdrawal was considered, at 81.81%, was increased access to government information online that a library could provide without FDLP membership. The next most frequently selected choice, at 63.63%, was that the direct and indirect costs of the Program outweighed its benefits to the library. The provision of government information to the general public was deemed not central to one (9.09%) library's mission, and three respondents (27.27%) selected onerous FDLP requirements and the fact that, though their libraries did have public missions, there was no indication that mission could not be met through means other

than FDLP participation, as reasons they had considered withdrawal. The remaining reasons for withdrawal were selected by respondents from 27% to just over 45% of libraries, including adequate geographic access to another FDLP library and evidence of low use of print government documents (both at 45.45%), a lack of space, loss or lack of staff to manage documents, and the need to limit building access for non-university affiliates (all at 36.36%). Two respondents added, by selecting an open-ended “Other” option, that the review of the documents program at their libraries, and consideration of withdrawal, was part of routine evaluations of collections and services made periodically to reconsider institutional priorities.

¶43 Of the respondents that had considered withdrawal but decided to remain in the Program, most (72.72%) cited the anticipated effort of the withdrawal process as a reason their libraries remain in the Program. The majority (63.63%) chose to stay, at least in part, because FDLP members are now permitted to opt for small collection rates, and 27.27% had moved to maintenance of predominantly online collections of government information. The irrevocable nature of withdrawal was also cited by 27.27% of respondents, 18.18% stayed to protect historical government documents they would risk losing if they withdrew, and 9.09% cited fear of backlash from surrounding libraries and a need to receive tangible government documents free of charge as reasons for staying. In response to the opportunity to list other reasons for staying in the FDLP, one librarian cited the benefit of training opportunities provided by the GPO, and a response on behalf of a second library cited some continued user preference for tangible documents and the continued challenge of unauthenticated online government information as reasons to remain FDLP members.

¶44 Costs of the Program outweighing the benefits was a popular reason for considering withdrawal, and four of the respondents had made efforts to determine what those costs were to their own libraries. Of those, two studies focused on labor and two on the replacement costs of materials that would be lost if they ceased to be members of the FDLP. Of the two studies of materials costs, the replacement cost of the items were very close—\$25,000 (for a study done in FY 2015) and \$20,000 (for a study done in FY 2000)—though the studies were done fifteen years apart. Both of these libraries responded that they had been decreasing their collections, but the change of rates for the fifteen-year period was not available, which makes it difficult to glean any comparative information from the values reported.

¶45 The other two respondent libraries where cost studies had been completed focused on the cost of the labor needed to process FDLP materials. Of those, one study was abandoned when allocation of the personnel costs proved difficult. The goal of the second analysis, completed in FY 2012, was to be more comparative as the librarians weighed between withdrawal from the Program and continuing at a reduced rate of selection, particularly for tangible items. As it became clear that the cost of withdrawal would outweigh the costs of continued participation with a decrease in selections, the analysis was curtailed and no final number was established.¹¹⁶

116. E-mail from Jane Wodlow, Assoc. Library Dir. & Adjunct Prof., Julien & Virginia Cornell Library, Vermont Law Sch., to author (Oct. 27, 2016, 3:54 PM) (on file with author).

¶46 Of all survey respondents, only one positively responded to the question:

In 2012, the Government Printing Office circulated the survey FDLP Library Forecast; 109 Academic Law Libraries responded. That survey asked if libraries were planning: 1) to enter new relationships to provide government information, 2) to participate in shared housing agreements to distribute parts of the documents collection, 3) to commit to preserving and hosting permanent digital collections of government documents or 4) to commit to the development of a specific subject area collection of government documents. If you responded yes to any of these plans, or have since made similar plans with regard to government document collections, would you be willing to talk to the researcher about those plans?

¶47 A follow-up call and e-mail revealed that the plans referred to related to a Cooperative Agreement to preserve large collections of historical print documents, relieving the regional library it served and its main campus library from the need to hold those items, which had become difficult due to space constraints.¹¹⁷

¶48 Though it is difficult to make broad conclusions based on the survey due to the low response rate, when viewed with the responses to the *Forecast Survey* it seems fair to question the continued commitment of law libraries to the FDLP beyond the receipt of small print collections with reliance primarily on online government information. If the GPO does push for greater collaboration among libraries, the *Schonfeld Report* prediction that we will continue minimal participation or, if forced to consider collaboration, withdraw, may be fulfilled. The final consideration in making the decision to leave or stay likely depends on what the GPO decides is next for the FDLP.

Current GPO Plans for the FDLP

¶49 In February 2016, the GPO published its *National Plan for Access to U.S. Government Information*.¹¹⁸ With a simply stated vision¹¹⁹ and mission,¹²⁰ the report includes strategic governance and review of the structure of the FDLP as goals for the GPO. Specifically, it plans to “[p]rovide a governance process and a sustainable network structure that ensures coordination across the Federal Depository Library Program and allows the most flexible and effective management of depository libraries and their resources.”¹²¹

¶50 While only a “framework” document,¹²² with more detailed plans required for implementation, the GPO clearly adopts some of the suggestions librarians have made, including (1) increased cataloging development of the pre-1976 government

117. E-mail from Jada Aitchison, Acquisitions/Serials Librarian, Univ. of Arkansas-Little Rock/Pulaski Cty. Law Library, to author (Dec. 6, 2016, 4:06 PM) (on file with author).

118. U.S. GOV'T PRINTING OFFICE, NATIONAL PLAN FOR ACCESS TO U.S. GOVERNMENT INFORMATION: A FRAMEWORK FOR A USER-CENTRIC SERVICE APPROACH TO PERMANENT PUBLIC ACCESS (2016), <https://www.fdlp.gov/file-repository/about-the-fdlp/gpo-projects/national-plan-for-access-to-u-s-government-information/2700-national-plan-for-access-to-u-s-government-information-a-framework-for-a-user-centric-service-approach-to-permanent-public-access> [https://perma.cc/4XSP-LD83].

119. “To provide Government information when and where it is needed.” *Id.* at 7.

120. “To provide readily discoverable and free public access to Federal Government information, now and for future generations.” *Id.*

121. *Id.* at 8.

122. *Id.* at 11.

documents,¹²³ (2) incentivized training programs that include the possibility of a certificate program or continuing education credits,¹²⁴ and (3) the development of the Federal Information Preservation Network (FIPNet) and an increase of digitization projects.¹²⁵ Also included are the development of depository library competencies¹²⁶ and changes to the way depository libraries are assessed to an outcomes-based model,¹²⁷ which could be viewed as added burdens of membership. More detail regarding new expectations of depository libraries should be available after a review of the FDLP guiding document, the *Legal Requirements and Program Regulations of the FDLP*, which is also a goal of the current plan.¹²⁸ For those still considering withdrawal, new details about the future administration of the FDLP might be significant enough to move us from a wait-and-see posture—or they may represent little change and provide no instruction at all.

Conclusion

¶51 It seems safe to say that many believe the FDLP structure is no longer well suited to its mission. A failure to change with the evolution in the means of access to government information has resulted in an FDLP model that arguably does not make the best use of its member depository libraries in the digital age. It is equally clear that the GPO wishes to change in the ways necessary to keep the FDLP viable and to ensure libraries, overall, find value in the partnership. In this time of change, a decision to withdraw from the FDLP may not be timely. The responses to the surveys discussed here indicate that most librarians are either not considering withdrawal for their institutions at all or are considering withdrawal but deciding against it; instead they are reducing their tangible selections, relying primarily on electronic government information, and waiting it out.

¶52 Unfortunately, this holding pattern may be more about tradition and apathy than any expectation of promise in the future potential of the FDLP. To engender more engaged participation than that indicated by responses to the *FDLP Forecast Survey*, it is imperative that the GPO develop a new FDLP model in which all libraries have incentive to participate fully. If, as the *Schonfeld Report* predicts, the perceived benefits of the FDLP for law libraries leave us with the choices of staying in the Program to keep superseded volumes of core legal documents or withdrawing, we may soon perceive no reason to stay and meet strict GPO requirements, no matter how infrequently they are reviewed. The *Forecast Survey* findings that fewer law librarians than other librarians anticipated increased barriers to digital government information within five years of the survey are likely because most law librarians also reported the use of non-FDLP resources by their users. This is probably because we have come to rely on friendly commercial vendors like HeinOnline and academic-driven resources like the Legal Information Institute and LLMC Digital to provide us with searchable government information, some

123. *Id.* at 10.

124. *Id.* at 8.

125. *Id.* at 10.

126. *Id.* at 9.

127. *Id.* at 8.

128. *Id.* at 9.

even integrated with other legal resources. However, in an industry with a history of takeovers and mergers, it is not possible to know that these and other similar sources will remain in their current forms indefinitely.

¶53 With the strain from budget reductions, resulting from shrinking law school class sizes, that threaten the library budget, at least at our library, the loss of positions preceded the loss of our budget for books and electronic resources. This loss of staff is having a direct impact on the ability of academic law libraries to continue providing some traditional services, and new initiatives have led us to replace them with new ones like the development and maintenance of institutional repositories. Processing print government documents has become a low priority as it seems to have a lesser return on investment, as evidenced in the survey results. There is a problem with the perception of the value of the FDLP, particularly the provision of tangible documents, and the GPO must hone in on priorities libraries continue to pursue and align new strategies with them to recapture the interest of its member libraries. Stronger digitization efforts militate in favor of continued participation in the FDLP for law libraries because such efforts intersect with two important components of the missions of most academic law libraries: open access and access to justice.

¶54 It is argued that there is a natural relationship between preservation of government information and scholarly communication. “Government funding of scholarly research has forged a shared space . . . [that] extends government information to encompass scholarly work as it is produced and disseminated.”¹²⁹ Though the thought that “[t]oday these units are brought together not by crisis but by opportunity”¹³⁰ may be a bit optimistic at this time for law libraries, at least in our case, the connection between government documents and scholarly communications supported the decision to place government documents coordination in the job description of the new position being developed to support the institutional repository. Though we currently have several of our own collections to digitize, we can see the digitization of a small government documents collection in our future. While this function is primarily served by one staff member, with periodic support from other staff and students, we would consider participating on some scale if the GPO provided a clear plan for digitization projects. Admittedly, this possibility was not on our radar until our FDLP membership and my research opened discussions; however, our first successful digitization project was born more out of opportunity than foresight, and we are excited about increasing digitization projects. Though it is not certain that FDLP digitization plans will fit our goals and resources, we will not irrevocably withdraw before knowing what part we can play in the GPO’s efforts.

¶55 Law libraries are an important part of the access to justice movement, and the provision of government information and assistance with its use are important components of how we fulfill that role. Though libraries arguably no longer need to be FDLP members to provide effective access to government information to the public, it does not necessarily follow that law libraries *should* withdraw from the FDLP at this time. “Access to justice includes access to information. It is an important mission for the legal profession to ensure that everyone has access to justice

129. Potvin & Sare, *supra* note 52, at 431.

130. *Id.* at 434.

through continued access to information.”¹³¹ “We should all be concerned about making sure credible resources for legal research are available to everyone.”¹³² We can be not just conduits but developers of that information going forward. Participation in FDPL digitization efforts may prove an easy and natural role for law libraries to assist in filling the gaps in the availability of free government information that increase access to this information to the general public.

¶56 With the GPO committed to reform, where available resources are not a significant deterrent to continued FDLP participation, the possibility that the GPO is looking to enhance FDLP priorities that align with current law library initiatives is encouraging. While law library leadership did not seem overly enthusiastic about participation in future FDLP plans in response to the *Forecast Survey*, the results of my survey show 45.83% of respondents still find value in FDLP membership—this could be an indicator of a willingness to grow with the Program in ways not anticipated at the time of the *Forecast Survey*. Even when patron needs are met through other means, we may be on the precipice of opportunities to participate in important initiatives that give us greater roles in the preservation of federal government information. Given the irrevocable nature of withdrawal from the FDLP and the promise of the GPO’s next steps for depository libraries, law libraries for which FDLP participation is not currently burdensome should make plans to work with the GPO as FDLP members to improve and ensure access to government information online. Obviously, where conditions like decreasing staffing levels, access issues, and space constraints are deterrents to participation, the decision to withdraw is legitimate. However, in a climate of threats to the freedom of access to government information, it seems best to hold on to any means by which we can be players in the preservation and dissemination of government information. Hopefully, the GPO is close to making changes to the FDLP that respond to the times and bring member libraries opportunities that make us enthusiastic about a role in the continued support of an informed citizenry, one that is aligned with both the mission and goals of the FDLP and the current conditions facing member libraries.

131. Deborah K. Hackerson, *Access to Justice Starts in the Library: The Importance of Competent Research Skills and Free/Low-Cost Research Resources*, 62 ME. L. REV. 473, 475 (2010).

132. *Id.* at 484.

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